



New initiatives in the development of customary land: group versus individual interests

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In 2007, Papua New Guinea's National Research Institute published a report from the National Land Development Taskforce 'Land Administration, Land Dispute Settlement, and Customary Land Development', which supported the current 'customary' system. This document was followed by the National Land Development Program Concept Design Document (National Land Development Program 2007). The PNG Cabinet endorsed the program outlined in this document and 28 million kina was committed for its implementation in the 2008 Budget. The program follows the concept of development through incorporated land groups, as introduced in the 1970s through the Incorporated Land Groups Act. This paper argues that land development in Papua New Guinea will continue to be marred by serious agency problems as long as the legal system fails to give definition to individual rights or interests in land.

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Academic attention to matters of customary and individual land tenure in Papua New Guinea has been recurring in recent years. In 2004, the Australian libertarian think tank, the Centre for Independent Studies, published several articles (Gosarevski Hughes and Windybank 2004a, 2004b) in which it was argued that communal ownership had not permitted any country to develop economically. Even more strongly, it was claimed that in Papua New Guinea, where 90 per cent of people lived on the land, the customary tenure system was the principal cause of poverty (Gosarevski et al. 2004a:137).

Jim Fingleton, the principal architect of Papua New Guinea's Incorporated Land Groups (ILG) Act, which attempted to give legislative meaning to customary land tenure, responded with a collection of edited papers claiming as 'demonstrably false the argument that customary land tenures are an impassable barrier to development' (Fingleton 2007:ix). Others contributed to the debate (for instance, Curtin and Lea 2006). Anthropologists James Weiner and Katie Glaskin (2007) sought to add fresh insight to the issue of customary land tenure with the publication of Customary



Land Tenure and Registration in Australia and Papua New Guinea: anthropological perspectives. AusAID (2007) also became involved and published a two-volume text on land issues *Making Land Work*, which focused on a number of countries in the Pacific, including Papua New Guinea (Papua New Guinea 2007).

At roughly the same time within Papua New Guinea, publications from the Divine Word University, UPNG Law School, and number of conferences highlighted the need for a recalibration of legislation governing customary land tenure. All this discussion appears to have generated political initiatives in Papua New Guinea itself. Reform initiatives started with the Land Summit in Lae. Papua New Guinea's own National Research Institute in 2007 published a report from the National Land Development Taskforce (2007) entitled *Land Administration, Land Dispute Settlement, and Customary Land Development*. This document was followed by the *National Land Development Program Concept Design Document* (National Land Development Program 2007). The PNG Cabinet endorsed the program outlined in this document (on 14 June 2008) and 28 million kina was committed to its implementation in the 2008 budget.¹ This program attempts to maintain the customary land concept through the implementation of incorporated land groups (ILGs) and the registration of land that allegedly belongs to the ILG. Although the legislation that would allow for the registration of customary land does not yet exist, the program proposes changes to the ILG Act that would allow for this. The nature of the proposed changes to the existing act has become clearer in a document produced by the Constitutional and Law Reform Commission (CLRC 2008) '*Review of Incorporated Land Groups and Design of a System of Voluntary Customary Registration*'. The former Minister for

Justice, Bire Kimisopa, instructed the CLRC to review the existing law in light of the recommendations of the National Land Development Task Force Report of 2007. Pilot implementation projects have been proposed for the periphery of Port Moresby and Lae (National Land Development Program 2007:4) once the necessary legislation is in place. It should also be mentioned that implementation will be tied to specific development projects.

Anthropologists have written the majority of the papers appearing in the literature. While anthropology has had much to say about customary land tenure, there could be a role for philosophy, especially in clarifying our conceptualisation. In the latter half of the twentieth century, linguistic analysis, popularised by the charismatic Ludwig Wittgenstein, became the preferred approach to philosophical problems. Linguistic analysis proceeded from the belief that a proper understanding of the use of language would resolve many of the fundamental problems of philosophy, rendering them understandable and resolvable. Wittgenstein believed that once the appropriate comprehension of linguistic use was realised, one would see that there were indeed no philosophical problems; rather the problems were simply confusions in linguistic use. Thus, linguistic analysis sought to demonstrate that philosophical literature from Parmenides to Plato and Bertram Russell was in reality anchored to a fundamental mistake: a response to illusory problems embedded in the confusions of our language. This idea proved to be a tantalising diagnosis of philosophical thought for Wittgenstein's disciples, but infuriating to Wittgenstein's critics, such as Bertram Russell and Karl Popper, who believed that fundamental philosophical problems could not simply disappear.

Although it is doubtful that an analysis of language use is going to satisfy the



perennial hunger for answers to the meaning of life, it could be useful in resolving some prominent issues that swirl around the concept of customary land tenure. In the introduction to their book, Weiner and Glaskin (2007:12) explain the nature of the selection of anthropological studies in the following words: 'The indigenous and the 'Western' are thus defined against each other and the articulation of each includes the other in its foundation.' These words underline a number of points. First, that the customary, and in particular, customary land tenure are essentially conceptualised within the legal and socioeconomic language of the West. This is the understanding that appears to be recognised by Weiner and Glaskin in the phrase 'the articulation of each includes the other in its foundation'. In fact, the relation is asymmetrical. Their volume offers an articulation of the Western concept of 'customary land tenure' and its application to the seemingly diverse practices and activities of Australian Aborigines and PNG Melanesians. What the activities have in common is what in English one would describe as 'exclusive rights over land'. Even to say something as minimal as this is, however, to assume a great deal—specifically, to assume that the other, the non-Western individual or linguistic group, has an understanding that mirrors the Western concept of a 'right'. In Papua New Guinea, for example, with about 800 linguistic groups, empirical validation would be a formidable task. Even this, however, is not really the point, which is that the study ineluctably struggles to define and make sense of certain activities and practices of exclusion and inclusion through terms belonging to the Western language of 'land tenure', 'rights', 'ownership', and so on. It is therefore initially exigent to determine whether these terms are being applied appropriately and in contexts in which they have meaning and therefore make sense.

Of course, the question arises as to why an appropriate analysis of terms is important for those not too inclined to be pedantic about the use of language. The key to the significance of the use of terms could be found in a further statement from Weiner and Glaskin's introduction:

Our goal in this volume is not in the first instance to make a case for customary land tenure *per se*, but to understand the mechanics of the translation process in which non-Western cultural forms are incorporated and regulated by Western legal and statutory bodies... in a fundamental cultural sense the customary is a product of state and capital formations and not external to it. (Weiner and Glaskin 2007:2).

The statement acknowledges that, once defined, 'the customary' is incorporated within the language of Western political discourse and inevitably within the Western definition of 'capital', thus giving these activities a functional role within the modern market economy. In other words, the form in which these indigenous activities is linguistically packaged and defined has far-reaching economic consequences.

Customary land tenure and group ownership

An appropriate starting point would be a consideration of the term 'ownership' and its use within the discourse of 'customary land tenure'. John Burton (2007:190), quoting Welsch, states: 'Wopkaimin land tenure is essentially communal in nature...everyone in [the] community shares rights to a large tract of undeveloped forest land used for hunting and foraging.' The significance of their status as designated owners of these tracts led to the identification of the



Wopkaimin as the traditional owners of Mt Fabilon and therefore as the primary group entitled to compensation from the Ok Tedi mining development. Burton works diligently to illustrate how the received dogma that native title is always communal rather than individual in nature has confused matters where issues of individual entitlement are concerned. The problem arises, however, insofar as the term 'ownership' might not be an appropriate term to describe a situation in which a number of people have tacitly agreed to share access to a given territory to pursue activities such as hunting, fishing and gathering. Given the accepted use of the term 'ownership', shared access falls far short of ownership in its modern linguistic, legal and economic meanings.

Therefore, one linguistic confusion involves the identification and conflation of the concept of ownership with the simple right of inclusive access. This has led to various difficulties in which numerous individuals claim to be the owners of mountains on the basis of having at one time hunted on the lower slopes.

In order to endow greater meaning or significance to activities that involve a general right of access for members of a particular group, the term 'collective', 'community' or 'group ownership' is often used. Burton seems to prefer the term 'owned commons'. Very few commentators on matters of customary land tenure, however, have bothered to note that this use of the term ownership is a serious departure from accepted use and particularly the attempted identification of ownership with collective rather than individual rights. Fingleton (2007), one of the architects of the ILG Act, in a paper 'A legal regime for issuing group titles to customary land: lessons from the East Sepik', stated that the idea behind this legislation was the recognition that 'customary land holding' was 'Community

Landholding'. The ILG Act, he claims, allows for the legal recognition of community landholding and is a radical approach designed to give Western legal effect to customary practice (Fingleton 2007:23-5). Insofar as the act purports to translate the customary into legal practice, it is said to be consistent with the PNG Constitution, which calls for development to be achieved 'primarily through the use of Papua New Guinean forms of social, political and economic organization' (Fingleton 2007:18). Additionally, it is claimed to be consistent with the recommendations of the 1974 Commission of Inquiry into Land Matters (CILM), which prescribed that the basic pattern should be to register group title and provide for the group to grant registrable rights (to group members) or leases (to non-members). Fingleton argued that it was anticipated that in order for the ILG to hold, manage and deal effectively with customary land a customary land registration law would be enacted. He believes it is unfortunate that such a law has not been forthcoming (Fingleton 2007:59). As we can see, this matter is being addressed through proposals to rewrite the ILG Act to allow for the registration of non-formalised customary land.

The proposed legislation articulated by the CLRC in 2008 attempts to address these and other issues. The central purpose of the proposed legislation, as stated by the commission, is to empower ILGs with the tools necessary to manage and develop land 'for economic development and wealth for the collective benefit of all its members'. From a reading, the ancillary purposes appear to be those of strengthening procedures relating to accountability and the validity of the registered group (CLRC 2008:XI). Under the current system, an ILG cannot deal directly with land because there is no provision for land registration. Customary land can be leased only through the 'lease,



lease-back' system under the *Land Act 1996*, which requires government participation. Accordingly, the alleged owners of customary land first lease the designated land to the government, which then leases it back to the ILG or to other parties. This device effectively suspends customary land use during the lease period. As well as the 'lease, lease-back' system, customary land can be accessed through the *Land Tenure Conversion Ordinance* (1963), which allows for registered freehold in customary land interests, thereby freeing the land from custom. Fingleton mentions that the CILM and the Land Titles Commission, which administered the ordinance, discredited it. The land dispute settlement machinery from the *Land Dispute Settlement Act* replaced the ordinance. The National Land Development Taskforce (2007:18) advocates that the *Land Tenure Conversion Act* be abolished. The CLRC also calls for the repeal of the *Land Tenure Conversion Act* and an amendment to the law to protect the ownership rights of the community (CLRC 2008:12–13).

The proposed legislation will allow ILGs to issue leases directly for the development of customary land without having to engage in the 'lease, lease-back' procedure. The proposed changes, as articulated by the CLRC (2008:IX), seek to provide a mechanism to register land through ILGs on a purely voluntary basis. The authors of the proposed legislation state that the proposals for land reform embody two distinct voluntary processes: the incorporation of landowners (ILGs) and registration of their land ownership (CLRC 2008:39). If, however, the proposed legislation is passed, the alleged group, when registering as an ILG, must provide evidence of rights to land including a sketch map of the customary land that the group claims (CLRC 2008:23). It follows that it is not entirely correct to claim that there are two distinct processes because there is indeed *prima facie* land registration at

the incorporation level when the group must provide evidence of the boundaries of the group's holding. The only difference is that at the point of land registration proper, the claim must become formalised and disputes must be resolved through processes of 'land adjudication' and 'boundary demarcation'. Moreover, although it is emphasised that the registration process is purely voluntary, it is stated that land registration is necessary when there is an intention to grant interests in or portions of land to a stranger, a clan member or the association itself (CLRC 2008:36). Given, however, that the rationale for the incorporation of the land groups is that of issuing leases (CLRC 2008:XI), it is somewhat disingenuous to assert that the process of registration is entirely voluntary insofar as land registration is necessary if leases are to be issued.

The question still remains: does group ownership make sense? One can argue that in order to exercise rights of ownership fully, these rights have to be ascribed to individuals rather than groups. Aside from the 'free-rider' issue, which unavoidably arises when land or other assets are managed and developed by a large group, other issues emerge with respect to alienation, transfer, and so on. Fingleton expresses regret that the ILG has failed to fulfil its intended legislative function—that of holding, managing and dealing with traditional lands. In reality, the majority of ILGs have been created solely for the purpose of distributing royalties from land, as has happened with forestry and petroleum development. The onus, however, falls on the proponents of ILGs to explain how rights to manage and dealings in land can be effectively realised at the collective level. First, the transaction costs, with decisions requiring the approval of all the 'owners', will always be an insurmountable burden. The other option—empowering agents to act unilaterally on behalf of the group—



exposes group interests to familiar agency costs, which, in the PNG context, have been difficult if not impossible to control.

Power (2007), in a recent AusAID text, alleges that ILGs have played a role in the success of the West New Britain oil-palm industry. He reported that a number of adjacent landowning groups were incorporated to put to economic use large parcels of land that were unused or were subject to ownership disputes. As a result, the people benefited from returns generated by New Britain Oil Palm Limited. Curtin (2003), however, has argued that two-thirds of Papua New Guinea's palm-oil is grown by foreign companies (three British, one Malaysian, one Belgian) on alienated land, and the balance by smallholders—and that many of these, notably in West New Britain, also own their land as individual block holders. Curtin (2003:8) goes on to argue that those who believe in the development potential of customary land through ILGs have yet to explain why there has been no attempt by 'landowners' to organise palm-oil production in other feasible areas (for example, East New Britain, East Sepik and Madang). In other words, Curtin strongly disputes the belief in the efficacy of the ILG as a vehicle for economic development.

Still, it remains the fact that ILGs have been used to some effect in New Britain within the palm-oil industry; but this does not establish an alleged appropriateness. When the ILG is used to develop land, one encounters a complex series of bureaucratic steps that have no reference to individual agency. These steps involve the initial organisation of individuals into an ILG; subsequent leasing of customary land by this group to the government; followed by government leases to the landowner company, which then leases the land out to the developer. Since, by definition, groups are composed of individuals, it is difficult to see how individual rights can be protected

through a complex legal process in which individual rights are left undefined or to be defined by the group.

In discussing smallholder oil-palm projects around Hoskins, East New Britain, Yala (2008) describes a situation in which disregard of legal niceties has at times created legal anarchy. Yala mentioned three groups with interests in land: one group that held 79-year leases on state land, another that worked customary land and another that received their interest from alleged 'customary owners'. Significantly, he reports that in 1991, 177 of the titleholders who held state leases were forcefully evicted by traditional 'landowners' and dispossessed without adequate compensation after the State agreed to allow the latter to take possession of the land. Yala's use of the term 'landowners' to describe the group that forcefully seized control of state land is indeed problematic since it is indisputable that the land was owned by the State and legitimately leased out. Again, this points to the frequent casual misuse of the term 'ownership' to describe a situation in which there is demonstrative absence of legitimate ownership by groups claiming putative customary ownership.

Given the current realities, one can conclude that the most frequently encountered functional use of the ILG has been for identification purposes, which means to identify individuals who could claim interests in land and to compensate them when others use this area. Even in this context, however, Fingleton (2007) admits to criticisms that agency issues have beset ILGs when used as vehicles for royalty distribution. On this issue, Fingleton attempts to deflect criticism by reference to problems of implementation and, specifically, failures in supervision. If, however, as Fingleton asserts, the act merely recognises custom rather than seeks to create it—that is, it gives legal effect to customary



practice, thus implying that custom is sufficient unto itself—why is it necessary to introduce an external supervisory control? This supposedly would be a supervisory control by an individual or individuals external to the customary group, as in the current Registrar of Incorporated Land Groups responsible for the registration of proposed ILGs or in the proposed Director of Customary Land Registration (CLRC 2008:41)—and therefore non-participants in the customary practices of the group—which undermines the foundational assumption that the act merely gives legal effect to existing customary practice.

Given these fundamental problems and following this line of thought, one could argue that the term 'ownership' can have content and meaning only when it is ascribed to individuals and not groups. One might do well to repeat the early definition of ownership offered by Blackstone's *Commentaries on the Law of England*, penned in the sixteenth century, in which it is pronounced that the 'right of property' is 'that sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe' (Tully 1980:73). It can be argued that in Western law there exist forms of ownership in which title is vested in more than one individual, as in joint tenancy and tenancy in common. Joint tenancy is, however, usually a form of ownership that involves two individuals rather than a group in which the survivor inherits the entire interest. Tenancy in common is also unlike the envisioned collective ownership in that each 'owner' can act unilaterally to dispose of his or her share of the property.

A further objection to the idea that the true meaning of ownership must be ownership by individuals rather than groups has been the reference to the corporate bodies in which interests are said to be

group owned. Nevertheless, as in tenancy in common, each individual owner of shares enjoys the exclusive right to dispose of his or her property without the consent of or reference to the interests of the other owners. Moreover, it is important to establish what is meant by reference to an incorporated body. An earlier legal view of corporations saw the corporation as a form of property subject to the ownership rights of its shareholders. This view has been largely discredited as a fundamental misconception. The now accepted interpretation does not envisage the corporation as a form of property owned by its shareholders. The collective enterprise described as a corporation has been interpreted according to a contractarian model, which sees the corporation as a nexus of contracts. This alternative model envisions the corporation as offering an umbrella that allows private parties to contract with one another more efficiently than they could in a market, by limiting the transaction costs. This view avoids the ontological issues that result when one regards the corporation as something that could possibly be owned. In any case, regarding the corporation and its assets as being owned by the shareholders is highly misleading insofar as shareholders have no right to manage or sell these assets unilaterally and no unlimited access to information and records relating to these assets. The corporation is therefore viewed more accurately as a device that operates as a nexus for all contracts that various individuals have voluntarily entered into for mutual benefit. Although, theoretically, the activities of the corporation could be undertaken by individuals through individual contracts in a market outside the corporate structure, the costs associated with enlisting cooperation would be significant. As R.H. Coase (1937) argues, the law in effect offers a standardised form of contract or a set of default rules that facilitates private ordering.



The above analysis demonstrates that 'ownership' in its English-language meaning denotes a context in which an individual exercises sovereign control over an asset that he/she is free to manage or at the very least dispose of unilaterally by sale or transfer. To claim that alleged customary community land tenure represents a form of ownership of land comparable with the ownership rights of a shareholder in a corporation is highly misleading insofar as the shareholder does not own the corporation or its assets (strictly speaking, the corporation owns the assets); rather, the shareholder owns shares in the company, shares that he/she controls unilaterally through rights to sell or transfer. The only Western form of ownership that limits the sovereignty of the individual's rights to dispose of the property is joint tenancy, but in this case we are really speaking of an arrangement in which two individuals, not a 'group', share a particular property and the limitations on individual initiative arise through a contract or agreement between two individuals to apply the rule of survivorship.

The discourse of 'ownership' usually entails sovereignty, particularly individual sovereignty, which means that the rest of the world cannot use, manage or transfer your holding without your consent. Clearly, individuals who make up a group that claims, for example, the ownership of a particular mountain, do not have the authority to stop other members from making use of the area. In reality, each individual has a usufruct—right of use—which falls well short of an ownership title. On the other hand, if we ascribe ownership to the 'group' rather than to the individuals who make it up, and the group represents all those sharing common customs who access a particular area, to the exclusion of other individuals and groups of individuals, we have a referent, which is not an individual or a designated number of distinct individuals but an abstraction.

Abstractions, unlike human individuals, do not have desires, goals and interests or even a will (unless one resorts to the fiction of the collective will) and therefore cannot act to utilise their alleged holdings. To ascribe ownership to a group is to paralyse any development or dealing in land or other assets, as we will see.

Certainly, the individuals who are said to belong to a group can act in concert or individually to prevent others from using the land, but no individual has the right to manage, develop or deal in the land individually and unilaterally. This right is supposed to belong to the 'group' and this can mean in practice only that nothing can be done with the land along these lines unless individuals belonging to the presumed 'group' agree. In other words, they must now contract among themselves to create rights to manage, develop, sublease or alienate the land or part thereof. As with Coase's interpretation of the corporation, the legal requirement that assets be held by a group, which according to the legislation requires the group to become an incorporated body, is in reality to prescribe a set of agreements or contracts between designated individuals that must be entered into before land can be managed, developed or dealt with in any meaningful way. Of necessity, the corollary is that if nothing is entered into nothing is done. In reality, the group, if it has a meaningful existence as an incorporated body, must, beyond mere registration, enact the agreements or contracts that bind these individuals together.

In other words, rather than having sovereignty over their land, group 'ownership' imposes extremely difficult contractual requirements while severely limiting the individual's ability to contract. What is imposed is a very limited freedom of contract. In order to utilise 'their land', individuals must enter into unanimous agreements with designated individuals



who are alleged to be members of their group while at the same time they are denied the freedom to contract with those outside the group unless originally sanctioned by consensus—that is, unanimous agreement of those within the group. Moreover, it needs to be appreciated that we are not talking about the familiar bilateral agreements or covenants between two contracting parties but multiparty agreements, which must have the universal consent of all designated parties within the group.

Therefore, if it is to gain legal reality, the landholding group represents a set of covenants (contracts) that individuals have agreed on with respect to a particular designated area of land. If there are no agreements or contracts, the group is an empty set. Since, as Fingleton (2007) has pointed out, no ILGs have been created to manage, develop or deal with land outside the forestry and petroleum sectors, where they are used as a mechanism to distribute royalty payments, the ILG in Papua New Guinea is a virtual empty set.

Realistically, how could it be otherwise? To impose the requirement that unanimous agreements must be formalised among relatively large numbers of people, usually clans, before land can be utilised is to stifle decision making and therefore any development. Of course, incorporation works in the West only because there is virtually unlimited freedom of contract and individuals are free to contract with any other individual in the universe. In contrast, the ILG constrains individuals to achieve consensus or universal consent within their group and among all individuals belonging to the purported customary group on issues such as development plans, management, benefits, and so on. Although in Papua New Guinea we do have ILGs in the petroleum and forestry sectors, these 'groups' are virtually contentless in terms of formal organisation and contractual obligation.

In nearly all cases, as Burton points out, most lack provisions for governance (Burton 2007:177) and often exist only on paper as they are simply created and registered through the payment of the appropriate fee. As Burton states, there are many incorporated groups in Papua New Guinea (about 10,000) entirely lacking in governance, whereas corresponding bodies among Australian Aborigines are full of governance but lack incorporated bodies.

One can assume this will continue to be the case in Papua New Guinea until the new legislation proposed by the CLRC comes into force. Until now, little has been formally required beyond mere registration; however, the reworked act proposes provision for a management structure that requires *inter alia*: a constitution, the creation of a management committee, annual general meetings, annual chairman's reports and financial reports (CLRC 2008:27). To use the words of Coase, the proposed act, to a much greater extent, subjects the ILG to a standardised form of contract or default rules to facilitate private ordering. It thus addresses the alleged lacunae with respect to the lack of governance. The question remains: will the changes overcome the difficulties associated with securing agreements among group members?

It now appears that except with regard to decisions on major issues by the management committee, unanimity is not required. In its explanation of the fiduciary duties of the management committee, it is stated that unless the constitution provides otherwise, decisions on major matters require unanimity (CLRC 2008:33). In, however, the sections of the act referring to 'meetings' of the membership, 'resolutions' and specific requirements for the conduct of meetings, Section 14D mandates an organisational structure in which decision making is achieved through a voting procedure (CLRC 2008:XIV). It is prescribed



that for a decision to be effected, 60 per cent of the membership must be present at the relevant meeting and at least 60 per cent of those present must vote to support the resolution. This proposal obviously addresses the issues raised with respect to problems associated with group decision making, which seem to require a form of consensus that requires unanimity. We can see, however, that a somewhat cumbersome mechanism is suggested in order to preserve the concept of group decision making.

Moreover, one can raise questions about whether the process does preserve the concept and ideal of group decision making. Theoretically, according to the formula, it is possible that 60 per cent of the 60 per cent of all members attending a given meeting can pass a resolution that is binding on the majority 64 per cent of the attending and non-attending members, who have not voted in favour of the resolution. It is equally possible that the resolution that this 36 per cent minority supports could embody policies that are contrary to the preferences or interests of the remaining 64 per cent majority of members. This means that the outlined voting procedure exposes the collective to the classic agency problem. As explained, a minority can successfully implement decisions that bind the majority, which means that there is no assurance that this minority, as agents, will not be acting to promote some private or particular interests that conflict with the interests of the group in its entirety. Beyond reference to the implied fiduciary duties, the act cannot provide legal protection against this possible eventuality.

In addition to the possibility that the procedure could result in policies that do not represent the will of the group or even the majority, there is, *a fortiori*, the issue of the protection of minority and individual interests. As Nozick (1974) convincingly argues, individual property rights serve

as fundamental constraints against the collective suppression of individual and minority interests, including expressions of personal liberty and preference. Individual ownership rights, in theory at least, give the individual sovereignty over his/her interest, which cannot be overcome by the decisions of the collective. Nozick calls these protections 'moral side constraints'. In the proposed articulation of group rights, however, in which property interests are defined in terms of group rather than individual interests, individual agency and individual interests have no protection against the decision making of the group, especially when the group could represent only 36 per cent of the membership.

It is precisely at this point that comparison of ILGs with commercial corporate bodies fails. In a commercial corporation, in which individual interests are defined, minorities and individuals who disagree with company policies or decisions can resolve their disagreements by selling their interests. Within the ILG, in which individual interests remain undefined, there are no avenues for the expression of individual interests when these conflict with the alleged will of the collective and especially if the collective itself is represented by a procedure that legitimises an expression of minority interests.

In endowing the ILG with a detailed governance structure, the CLRC is perhaps recognising that it has been a mistake to assume that the mere act of incorporating the 'customary group' is sufficient to give legal effect to an effective customary decision-making process. In fact, customary practice did not translate into efficient, fair and equitable management of customary land—more often finding its most frequent use as an identificatory mechanism for the distribution of royalties and compensation monies. Thus, the new rules, which seek to formalise the decision-making process, can



also be seen as representing a significant departure from an earlier strategy that was supposed to leave matters to local custom.

The proposed legislation stands open to the criticism made by Sullivan (1997) with respect to Aboriginal corporate bodies in Australia, which sees these entities as departures from customary tradition. For example, Sullivan points out that with respect to Aboriginal corporate bodies the registrar usually prefers that the method of decision making at meetings be by voting and that the method of appointment to the governing committee be by election. He argues that this is contrary to Aboriginal custom. Obviously, similar observations could be applied to the recommendations outlined in the review of Papua New Guinea's Constitutional and Law Reform Commission.

The alleged primacy of group rights?

We have suggested that Fingleton's approach to the issue of customary interests in land centres on an unexplained and unproved assumption that customary land tenure entails collective or group ownership rather than individual ownership, which would mean that traditional forms of life in Papua New Guinea never admitted the possibility of individual and exclusive interests in land. It could be, however, that the concept of collective ownership was an imposed dogma derived from the legislation of the colonial and post-colonial administrations rather than a term that had any tangible meaning in pre-colonial Melanesia. Weiner (2007), for example, disputes the idea of functional collective ownership and management of land in the Southern Highlands.

Another anthropologist from The Australian National University in the same volume comes very close to endorsing

the notion that the term 'collective' has a legislative rather than a customary origin. John Burton (2007), in a study of groups and ownership in Papua New Guinea and the Torres Strait Islands, remarks that in Papua New Guinea, from a customary point of view, individuals can own land but the legislative response to land matters, as in Australia, places an equally heavy emphasis on collective ownership of land. Moreover, he relates an encounter with an elderly councillor on Mer Island in the Torres Strait complaining about the inability to assert individual title. The councillor pointed out that although the famous Mabo decision appeared to promote islander autonomy, the government subsequently gave what the islanders did not want in terms of forced collectivisation of traditional land (Burton 2007:195).

The point is that the majority of common disputes with regard to land tenure involve tussles between individuals and families over rights. Assigning rights to groups rather than individuals or even families does nothing to advance resolution; it is significant that apparently the only time PNG Melanesians have recourse to so-called group rights through ILGs occurs when outside parties—developers—initiate projects in the fields of forestry or petroleum, thus echoing the words of Weiner and Glaskin (2007:2) that the 'customary is a product of state and capital formations and not external to it'.

One should mention a further rationale advanced for the primacy of group interests over individual rights. This view is supported by the belief that individual interests in land do not extend beyond the putative territory and territorial boundaries of the customary group to which one belongs. It would follow therefore that all individual interests are founded on a primary interest held by all members of the group, such that there are no individual interests in land that are not also



subject to the primary group interest and therefore the interests of all other members of the customary group. As Power (1988) has stated: 'Individual land usage rights did not remove the reality that the group was the basis for ownership and the basis for the defense of these rights' (see also de Coppet 1990). This thinking founds the presumption that a definition of a given customary group implicitly defines a discrete area of land that circumscribes the interests in land held by all members of the group. One would not, however, assume in a Western context that kinship and clan relations define individual interests in assets and land, but many assume with little evidence this is axiomatically the case in Melanesia.

There exist anecdotal accounts that give strong indications of instances of individual rather than communal forms of land interest that are not founded on some primary form of collective land tenure. For example, my late wife's father exercises exclusive claims to land areas proximate to the Kupiano Station in Central Province to the exclusion of the rest of his clan, the Keruerupa of Gavone village east of Kupiano Station. As to whether other members of his clan or the clan itself can make a claim to this area, I have been informed that this is not possible because if other members of his clan attempt to claim or make use of 'his' land they will be repulsed by the so-called 'inland people' of Topol village. Evidently, there exists an understanding between my late wife's father and the Topol people about the division of this area of land for exclusive use. The agreement dates back to a period when my father-in-law's parents first gardened and grew coconut and sago in the area and this exclusive use serves as the basis of his current interest. Moreover, beyond oral and behavioural evidence, his interest is further supported through written documentation attested by means of individual 'marks'. I refer to this story

because clearly it represents a narrative of customary practice in which individual rather than collective interests are given prominence. Moreover, the individual rights asserted are in no way based on an underlying group title. Indeed, my father-in-law's interest and title are asserted against and exclude the interests of the customary group to which he belongs.

Customary land tenure as community holdings

One issue that has been a focus of controversy is the identification of the group that can be satisfactorily registered as an ILG. We have pointed out that unlike human individuals, a group is really an abstraction. This is meant in the sense that inclusion with a given group is often dependent only on the selection of defining characteristics. The act uses very general language and so it is reasonable to include within the definition families, clans, villages and tribes. The *Land Groups Incorporation Act* (ch.147) requires that groups seeking to be registered must satisfy two conditions

- the members of groups possess common interests and coherence independently of the proposed recognition and share or are prepared to share common customs
- the association between groups represents a customary form of organisation.

When, however, families are registered, it causes great controversy. Nevertheless, there is nothing within the language of the act that explicitly excludes families. From the discussion within the text provided by the CLRC, it would appear that the group must be greater than a mere family of genetically related people. When, however, one member of the commission recommended



that the group provide genealogies for its membership, this suggestion was rejected. The commission did decide that all members must provide copies of their birth certificates, which it was claimed would provide sufficient genealogical grounding through the requirements of the *Civil Registration Act* (CLRC 2008:21).

This requirement, however, addresses only the most blatant abuses when membership might include non-citizens and even non-persons, but does not sufficiently address the issue of group relatedness. Theoretically, a group could refer to a tribe, but often tribes are dispersed among different communities and so the tribe might be too large a unit. Most people who look at the existing act hold that the group means 'clan', but this could also be less than satisfactory. For example, a local community might consist of several clans and subclans. Surely the decisions of a clan with respect to land can seriously affect the lives and landholdings of other members of the village community who are not clan members. Should not other members of the community who do not belong to the landholding clan have a say in the disposition of land that falls within the boundaries of the community? One can see that the reference to the 'group' as the landholding unit is at best ambiguous and fraught with possible controversy. To settle disputes, administrators and judges could find themselves simply guessing the intent of the legislation.

Finally, I want to return to what I believe is a revealing statement on the part of Fingleton (2007), when he refers to customary landholding as 'community' landholding. Through this statement, Fingleton wishes to impress on us the conviction that the ILG is the expression of a reality in which land is held by the community rather than by individuals. This statement is significant not merely because it

is the opinion of an informed commentator, but a fortiori because the source is a principal architect of the original legislation and therefore the statement is indicative of the intent of the legislator. What needs to be said, however, is that the 'community', unlike concrete human individuals, can be ontically problematic. Reference to the community could elicit various connotations and feelings, but what exactly is meant by the 'community'? Benedict Anderson (2003) wrote a well-received book about the emergence of nationhood entitled *Imagined Communities: reflections on the origin and spread of nationalism*, in which he argued that all viable nations were in fact essentially imagined communities. Nations consist of people who have never met and never will meet, but in order to achieve a sense of interconnection it is necessary for each member to imagine oneself as part of a vast community that includes all these unknown individuals. In other words, a 'nation' exists through an act of imagination in which all those who regard themselves as members of the 'nation' imagine themselves belonging to a vast community of unknown others. The 'nation', Anderson claims, is this imagined community. For Anderson, the dawn of national consciousness was not so much awareness or a discovery of a set of facts; rather, it was synonymous with a collective act of the imagination after the dissolution of dynastic regimes and universalised sacred communities such as those of Christendom. Anderson (2003:6) goes on to make the point that most communities, indeed all communities larger than primordial villages of face-to-face contact, and perhaps even these, are largely imagined.

One might also apply the same analysis to the Melanesian 'village community'. It is also an imagined community that projects an interconnection between individuals existing in the present with a membership existing in the past and the



future. Anthropologists and others hold that the community sees itself as having a temporal as well as a spatial dimension. With regard to the former, it sees itself as having extended links with its ancestors, many of whom are now no longer known or remembered, and to the future through children and the yet unborn (Mantovani 1987). The Melanesian community no less than the modern nation exists through an act of imagination, insofar as it consists of many people who will never meet but who exist and are related through the imagination of the present members. In reality, this means that many of the essential relationships that create this unity are largely imagined, even though they can inspire feelings and emotional attachments.

The point has been made that Papua New Guineans often prefer to refer to themselves as 'landowners' rather than PNG citizens. In other words, identification with the village and a particular village in which they have attachments to the land is stronger than their linkages with the modern state of Papua New Guinea. It is possible that with the diversity of languages and cultural groups, individual Papua New Guineans, except when abroad, find it difficult to imagine themselves as part of a unified national community called Papua New Guinea. Conditions in Papua New Guinea have yet to stimulate a collective act of the imagination in which diverse tribes of people see themselves as a part of a wider community defined by the territorial boundaries of the present political state. Anderson (2003:67-83) emphasised that the creation of nations depended on the growth of vernaculars or 'national print languages' that challenged the old sacred languages of Latin, Greek and Arabic.

In Papua New Guinea, there is no common vernacular of the status of a 'national print language' that has been able to bind together the many diverse

communities and tribal groupings. Even with two national English-language newspapers, PNG individuals still feel the closest identification with those belonging to their own language group—that is, their *wantoks* or those who speak the same language. Given these realities, the sense of identity remains local and focused on one's village. (Moreover, the attachment to a local rather than a national identity has been even more pronounced in recent decades, especially in remote rural areas that are no longer linked to the political centres since the demise in the 1980s of Talair and Douglas Airways, which used to provide these remote areas with essential services and communication.)

This focus on local identity could explain why Melanesian village dwellers regard themselves as possessing the valleys, riverbeds and mountainous regions that encircle and define their immediate natural environment. In contrast, Westerners in the same context would tend to view these geographical features as belonging to the State as representative of the wider community, the nation-state, while reserving the term 'ownership' for the immediate private holdings they have acquired as individuals.² At the same time, it is arguable that the English term 'ownership' with its legal and economic implications has been inappropriately used to denote this feeling or emotional attachment to a locality or common territory that is shared by the members of a Melanesian community.

Our point, however, is that imagined relationships, accompanied by strong feelings of local identity, can have real anarchic consequences, and thus cannot substitute for real rules of governance that unambiguously specify individual entitlements that provide viable contexts for real contractual agreements. These organisational formalities are indeed necessary if land is to be effectively managed



within the capital and political structures of the modern state.

Conclusion

The proposed legislation with respect to ILGs has been initiated with the intention to transform the ILG into an efficient and effective mechanism for the development and mobilisation of land for the benefit of the customary land 'group'. As we have explained, the proposed legislation is an admission that reliance on custom has not been successful, and the recommendations call for specific rules of corporate governance that could be contrary to custom. The proposed changes impose a universal template on the decision-making process modelled on the political or democratic ideal of voting, which can hardly claim to capture a diversity of customary procedures across multiple ethnic groups.

Overall, the changes to the act, as proposed by the CLRC, could facilitate the development of land, especially with respect to the pilot projects proposed for the Port Moresby and Lae areas. As explained, however, development could occur at the expense of individual and minority interests, not to mention the possibility that decisions could simply be contrary to the preferences of the majority. Given the new rules, it is not difficult to envision a politically active, educated minority taking advantage of the voting procedures and pushing through policies and decisions that compromise the interests of the less active or less well-informed majority.

There is a sense that the proposed legislation does not address the issue of grassroots initiatives involving the development of customary land but could be intended to facilitate larger-scale development projects designed for the urban areas of Port Moresby and Lae. This is understandable insofar as urban expansion has created a need to free up more customary land in order to

allow for further development to meet the needs generated by rapid urban expansion. Land tenure issues at the grassroots level, however, often have a more familial not to mention individualistic orientation.³ Family and individual ownership rights address these issues and define specific interests, whereas the language of group rights elides these interests and thereby vitiates individual initiatives and fundamental issues that occur at this level.

Notes

- ¹ Esekia Warvi of the PNG National Research Institute was the source of this information.
- ² In Commonwealth countries such as New Zealand and Canada, these relatively unoccupied areas are referred to as Crown lands—in other words, as belonging to the State.
- ³ Individual and family entitlements are not entirely distinguishable. For example, in Italy, according to the '*Asse ereditaria*', a person must leave at least 75 per cent of their estate to their legitimate children in equal parts.

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